

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOHN MAHL,

Plaintiff-Appellee,

v

SCOTT MAGUIRE,

Defendant-Appellant.

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UNPUBLISHED

October 6, 2009

No. 287130

Genesee Circuit Court

LC No. 07-086831-CZ

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying his motion for summary disposition based on governmental immunity. For the reasons set forth in this opinion, we reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant is a police officer for Montrose Township. On January 27, 2007, at 4:30 a.m., he responded to an assault complaint made by plaintiff's ex-wife, Janae Mahl. When defendant arrived, Janae told him plaintiff threatened to kill her; she showed him vehicles in her driveway that had slashed tires, and a kicked-in window of her house. She then identified plaintiff as the driver of a blue truck passing by the house. Defendant pursued in his police car, stopped plaintiff, and had him get out of his truck. According to plaintiff, before defendant handcuffed him, plaintiff advised him that he had an injured shoulder and, because he could not put both hands behind his back, he would have to be handcuffed in front. Plaintiff said he had a doctor's note to that effect, but it was at home.<sup>1</sup> Defendant then placed the handcuffs with plaintiff's hands behind his back and placed him into the police vehicle. According to plaintiff, defendant also slammed the car door on his foot. Because plaintiff continued to complain about the pain in his shoulder, defendant called an ambulance, which took him to the hospital for examination. Plaintiff's arm was placed in a sling and defendant then took him to jail.

Plaintiff sued for assault and battery and gross negligence, alleging that despite being told plaintiff had an injured shoulder, defendant "grabbed Plaintiff's arm, bent it, pulled it behind

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<sup>1</sup> In fact, the doctor's restrictions concerned only plaintiff lifting and raising his arms.

Plaintiff's back and yanked upward while putting on the handcuffs," and then "forcefully shoved Plaintiff into the car," which caused his shoulder to "rip," and "slammed Plaintiff's foot in the door of the squad car." He did not base any of his claims on constitutional violations. Defendant moved for summary disposition based on governmental immunity, arguing that he acted reasonably under the circumstances. In response to the allegations set forth by plaintiff, defendant stated his actions were premised on his concerns that plaintiff had a knife or another form of a weapon which defendant used to slash the tires. Plaintiff had a record of several complaints for assault. Defendant stated that the only time he had ever handcuffed someone in front was when he arrested someone so large that his hands did not meet in back. Cuffing in front was more dangerous to the officer because it would still allow the suspect to fight.

The trial court declined to find that defendant was immune as a matter of law because whether his actions were "reasonable" was a matter for a jury to decide. The court found there was a factual dispute regarding whether defendant pulled plaintiff's arms up over his head after cuffing him. The court's conclusion was that a jury, if it believed plaintiff's version, could find that defendant used unreasonable force when he cuffed plaintiff behind his back when asked not to, pulled his arms over his head, and threw him in the police car in a manner that caused him to hit his shoulder on the seat. The court found the same question of fact existed for both the intentional tort and the gross negligence counts.

We review de novo a trial court's determination regarding a motion for summary disposition. *Odom v Wayne County*, 482 Mich 459, 466; 760 NW2d 217 (2008). Under MCR 2.116(C)(7), the moving party may support its motion for summary disposition with admissible, documentary evidence. *Id.*; MCR 2.116(G). "The contents of the complaint are accepted as true unless contradicted" by the evidence provided. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

## I. Assault and battery

Under MCL 691.1407 of the governmental tort liability act (GTLA), a governmental employee is immune from liability for intentional torts if he can establish that (1) the employee's challenged acts were undertaken during the course of employment and that the employee was acting, or reasonably believed he was acting, within the scope of his authority, (2) the acts were undertaken in good faith, and (3) the acts were discretionary, rather than ministerial, in nature. *Odom, supra* at 461, citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984). In this case, there is no dispute that defendant was acting within the scope of his duties. Nor is there debate whether he was performing a discretionary act. *Ross, supra* at 660 n 51. Only the element of good faith is in question. In *Firestone v Rice*, 71 Mich 377, 384; 38 NW 885 (1888), in which the plaintiff brought an action for false imprisonment and assault and battery against a police officer for handcuffing him, our Supreme Court held:

There must be some discretion reposed in a sheriff or other officer, making an arrest for felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension. And this discretion cannot be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity.

Similarly, in *Armstrong v Ross Twp*, 82 Mich App 77, 85-86; 266 NW2d 674 (1978), this Court described good faith simply as acting without malice. And in *Dickey v Fluhart*, 146 Mich App 268, 276; 380 NW2d 76 (1985), this Court held that an “action may lie only if the officer has utilized wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity.”

In the context of assault and battery committed during the apprehension of a suspect, a court inquires whether the amount of force used to affect an arrest by a police officer was justified—that is, whether that force was “objectively reasonable under the circumstances.” *VanVorous v Burmeister*, 262 Mich App 467, 482; 687 NW2d 132 (2004), citing *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984).

In this case, defendant admitted that plaintiff was compliant once his truck was stopped. However, plaintiff does not argue that defendant should not have handcuffed him or should not have placed him in the police car. Nor does plaintiff argue that defendant took any separate actions that were unnecessary. Plaintiff’s argument is that defendant used too much force in performing the actions necessary for the arrest. The trial court seemed to take the position that once plaintiff asked to be handcuffed in front, there was no reason for defendant to do otherwise. Yet testimony from both defendant and another officer explained that suspects handcuffed in front are still able to fight, and here defendant was attempting to take into custody someone with the known potential to be physically violent, whom he suspected of having a knife and whom defendant believed at the time of the arrest, had threatened to kill Janae Mahl. There is no evidence that defendant in bad faith disregarded plaintiff’s request to be handcuffed in the front. Plaintiff’s claim is based entirely on his assertion that defendant should have believed his statement that his shoulder would be injured and that defendant should have increased the risk to himself by handcuffing plaintiff in front and permitting plaintiff to comfortably get himself into the police car. Plaintiff’s claim of defendant’s “reckless indifference” is further belied by the fact that defendant summoned an ambulance and permitted plaintiff to undergo medical examination once defendant was satisfied that plaintiff was unarmed.

The trial court was correct in finding there were differences between plaintiff’s and defendant’s versions of what happened. However, even when plaintiff’s version is taken at face value, his allegations do not arise to the level of bad faith and reckless indifference required by case law.

## II. Gross negligence

In cases like the present one, the conduct of a governmental employee is immune from liability if it “does not amount to gross negligence that is the proximate cause of the injury or damage.” MCL 691.1407(2)(c). “Gross negligence” is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a).

The trial court denied defendant’s motion regarding this count because the same facts supported it and the argument was “almost the same” as that underlying the intentional tort claim. However, this Court has repeatedly “rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence.” *VanVorous, supra* at 483-484, citing *Smith v Stolberg*, 231 Mich App 256, 258-259; 586 NW2d 103 (1998); *Sudul v Hamtramck*, 221 Mich App 455, 458, 477; 562 NW2d 478 (1997). A plaintiff’s gross

negligence claim that is “fully premised on [a] claim of excessive force” used by the same defendant is subsumed by the intentional tort claim; there is no cause of action for assault and battery by gross negligence. *VanVorous, supra* at 483; see also *Sudul, supra* at 476-489 (Murphy, PJ, concurring in part). In the present case, both of plaintiff’s claims are premised on the same facts. His gross negligence count alleges in relevant part that defendant breached his duty to plaintiff, “when, with deliberate indifference and gross negligence and without regarding [sic] to Plaintiff’s rights and welfare, he committed the actions set forth above.” As in *Sudul*, the conduct at issue was unjustified physical contact, i.e., the intentional tort of battery. This court ruled that the trial court should have dismissed plaintiff’s gross negligence count regardless of the existence of any factual dispute because it was duplicative of, and subsumed by, his count for assault and battery. Accordingly, we require that the trial court undertake the same action in this matter.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray  
/s/ Jane E. Markey  
/s/ Stephen L. Borrello